

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

X

RONALD PERRO,

Plaintiff,

MEMORANDUM AND ORDER

-against-

05-CV-1020 (JG)

UNITED STATES OF AMERICA,

Defendant.

X

JOHN GLEESON, United States District Judge:

This is a *pro se* action in which plaintiff, Ronald Perro, alleges that unnamed employees of the Federal Bureau of Prisons ("BOP") failed to provide him with dentures after removing most of his teeth. By order dated March 28, 2005, this Court granted plaintiff's request to proceed *in forma pauperis*, but directed that plaintiff amend his complaint. This Court noted, *inter alia*, that it was uncertain 1) whether plaintiff was attempting to advance a claim pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 2) whether plaintiff's claim pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1331-1346(b), 2671-2680, was premature.

On April 13, 2005, plaintiff filed an amended complaint, which clarifies that this action is being brought solely pursuant to the FTCA. However, the amended complaint also indicates that plaintiff's FTCA claim is premature in that plaintiff's tort claim was not denied by BOP's Regional Counsel until well after this action was commenced.

As noted in this Court's prior order in this case, the FTCA provides:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope

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of his office or employment, **unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing**

28 U.S.C. § 2675(a) (emphasis added). Since “the terms of [the government’s] consent to be sued in any court define that court’s jurisdiction to entertain the suit,” *United States v. Sherwood*, 312 U.S. 584, 586 (1941), “[a]ny limitations imposed by the waiver statute, whether they be substantive, procedural, or temporal, are to be strictly applied against the claimant.” *Millares Guiraldes de Tineo v. United States*, 137 F.3d 715, 719 (2d Cir. 1998) (citing cases). Section 2675(a) unambiguously “bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.” *McNeil v. United States*, 508 U.S. 106, 113 (1993). A Court therefore lacks subject matter jurisdiction over prematurely filed FTCA claims, even if the plaintiff subsequently exhausts his administrative remedies before substantial progress has been made in the litigation. *Id.* at 111-13; *see, e.g., Hyatt v. United States*, 986 F.Supp. 96, 100 (E.D.N.Y. 1997).

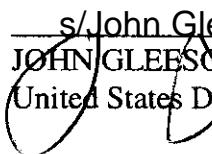
Since it appears that this Court lacks subject matter jurisdiction, this action must be dismissed. *See Fed. R. Civ. P. 12(h)(3)*. However, because plaintiff could state a cause of action under the FTCA if he were to commence a new action by filing a complaint similar to his Amended Complaint in this action, plaintiff’s action is dismissed without prejudice.

Conclusion

For the reasons stated above, this action is hereby dismissed without prejudice. *See Fed. R. Civ. P. 12(h)(3)*. Plaintiff may re-file this action at any time within six months after the date on which BOP mailed plaintiff notice of its final denial of his tort claim. *See 28 U.S.C. §2401(b)*.

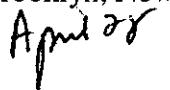
Plaintiff may use the Amended Complaint in this action as his complaint in a new action, but should omit the docket number and change the caption to read, "Complaint," rather than "Amended Complaint." If plaintiff wishes to proceed *in forma pauperis* in the new action, he must submit a new request along with his new complaint.

So Ordered.



S/John Gleeson
JOHN GLEESON
United States District Judge

Dated: Brooklyn, New York


April 28, 2005